

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIKA LEE DAVIS,

Defendant-Appellant.

UNPUBLISHED

December 20, 2011

No. 300647

Charlevoix Circuit Court

LC No. 10-067910-FH

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right a jury conviction for delivery of less than 50 grams of a controlled substance within 1,000 feet of school property. See MCL 333.7401(2)(a)(iv), 333.7410(2). We affirm.

Defendant's convictions arise from her delivery of two thirty-milligram Oxycodone pills to a confidential informant who paid defendant with two pre-recorded twenty-dollar bills during this controlled purchase. The police did not immediately arrest defendant and, although the pills were recovered, the twenty-dollar bills were not recovered. Defendant was not immediately arrested to allow for further police investigation and to protect the identity of the confidential informant. However, after several attempts to contact the confidential informant to arrange for additional controlled purchases from defendant were unsuccessful, defendant was questioned by police and then arrested.

On appeal, defendant argues that her due process rights were violated by the 43-day pre-arrest delay because the delay unfairly prejudiced her ability to present a defense. We disagree. Defendant failed to raise this issue before the trial court; therefore, our review is for plain error. See *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999).

To succeed on her prearrest delay claim, defendant must establish (1) actual and substantial prejudice to her right to a fair trial and (2) that the prosecution intended to gain a tactical advantage. *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009) (citation omitted). Actual prejudice must be demonstrated, not mere speculative prejudice. *People v Adams*, 232 Mich App 128, 135; 591 NW2d 44 (1998) (citation omitted). And to be substantial, the prejudice to defendant must have meaningfully impaired her ability to defend against the charge such that the outcome of the proceedings was likely affected. *Patton*, 285 Mich App at 237. If defendant establishes prejudice, the prosecutor bears the burden of persuasion and must

show that the reason for the delay was sufficient to justify the prejudice. *Id.* The need to investigate further, rather than a desire to obtain a tactical advantage, is a proper reason for a delay. *Adams*, 232 Mich App at 140.

Defendant argues that the prearrest delay unfairly prejudiced her ability to present a defense “because the delay made it impossible for [her] to present exculpatory evidence.” The purported “exculpatory evidence” was the pre-recorded twenty-dollar bills that were not recovered by police. Defendant argues that because the twenty-dollar bills were not recovered she was unable to prove a “defense that she never took money for the pills.” However, defendant was on trial for “delivery” of a controlled substance. See MCL 333.7401(2)(a)(iv). “Delivery” means “the actual, constructive, or attempted transfer from 1 person to another of a controlled substance, whether or not there is an agency relationship.” MCL 333.7105(1); see, also, *People v Schultz*, 246 Mich App 695, 703-704; 635 NW2d 491 (2001). The amount and nature of the controlled substance are elements of a delivery offense under MCL 333.7401, but the exchange of money is not an element of the offense. See *id.*; see, also, *People v Mass*, 464 Mich 615, 626; 628 NW2d 540 (2001). Thus, defendant’s claim that she was unable to prove a “defense that she never took money for the pills” is without merit. Accordingly, defendant has failed to establish actual and substantial prejudice to her right to a fair trial; thus, we need not consider her related claim that the prearrest delay was for the purpose of gaining a tactical advantage.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter